

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MITSUBISHI HITACHI POWER SYSTEMS  
AMERICAS, INC.

and

Case No. 12-CA-188952

MOHAMED SHAHAT, an Individual

**RESPONDENT EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS**

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Mitsubishi Hitachi Power Systems Americas, Inc. ("Respondent" or "Employer") submits its brief in support of "Respondent Employer's Exceptions to Administrative Law Judge's Decision" ("Exceptions").

On February 1, 2018, the Administrative Law Judge ("ALJ") issued a decision ("Decision") in which he made various factual findings before recommending dismissal of three claims presented to him but also concluding Employer had violated Section 8(a)(1) of the National Labor Relations Act ("Act") by discharging employee Mohamed Shahat ("Shahat").<sup>1</sup> Employer does not take exception to the recommended dismissals, but does take multiple exceptions (as set forth in its "Exceptions") to ALJ findings and conclusions as to Shahat and the Section 8(a)(1) issues. A review of the Decision in light of the record evidence and applicable law demonstrates that, in addressing the Shahat discharge, the ALJ made findings not supported by the evidence and reached conclusions not supported by the evidence or by the law.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Respondent Employer fired Charging Party Shahat only because the company's numerous and various multi-year efforts to improve his performance were unsuccessful. The decision to discharge Shahat was made before the decisionmakers knew of any Shahat complaint but after Shahat knew his job was in jeopardy. Employer conducted a reasonable investigation of the complaint and, after concluding that there was no basis for it, implemented the discharge decision that had been made before Shahat's complaint was known.

Shahat claims that he was mistreated and disrespected by his supervisor, Arash Mohajeri ("Mohajeri"). However, the evidence showed that Shahat was a difficult employee who routinely resisted instructions and constructive criticism, thus requiring the company to use extraordinary measures to try to motivate him and improve his job performance. For example, Shahat was given an overall "needs improvement" in the first draft of his 2015/2016 annual evaluation but, in an

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<sup>1</sup> The Decision and the transcript of the hearing in this matter are cited, respectively, as "Dec. \_\_\_\_" and "Tr. \_\_\_\_" followed by the cited page number and, sometimes, the name of the witness if important for context. The exhibits are cited "GC Ex. \_\_\_\_" or "Resp. Ex. \_\_\_\_" followed by the exhibit number and, in some citations, a notation as to the relevant portion of that exhibit. Citations often are grouped at the end of a paragraph to enhance the readability of the text.

effort to motivate him, his manager Phil Deen (“Deen”) and Mohajeri decided to increase Shahat’s final grade to a “meets expectations” assessment so he would not be placed on a performance improvement plan that would have had serious and negative impacts on his career path. Although Shahat was informed at the time of his evaluation that his performance must improve, the company’s artificial increase of his overall evaluation grade—which was not required by any policy or procedure--was unsuccessful. In fact, approximately seven weeks later, Shahat refused a direct order to change the location of his workstation. Deen and the company’s Vice President of Human Resources Brian Shannon (“Shannon”) then decided that Shahat must be discharged because his performance had not improved and it was “time to cut our losses.” Shahat knew on that day (July 7, 2016) that his job was in serious trouble because he had refused to relocate.

Shahat was not immediately separated after the making of the discharge decision because, on the next day he was at work, July 11, 2016, he submitted a written complaint of mistreatment by Mohajeri. As a result of that complaint, Employer decided to postpone the implementation of the discharge decision (made the prior week) until Shahat’s complaint could be investigated so that, if it was found to have merit, the discharge decision could be re-considered. The investigation subsequently was completed, no wrongdoing was found, and Shahat’s job performance had not improved in the interim, so the early July discharge decision was implemented and Shahat was released in October 2016.

The ALJ erred in making certain factual findings, in overlooking critical evidence, and in reaching conclusions not supported by the facts or law, including by concluding (a) Shahat had engaged in “concerted” activity; (b) Shahat’s complaint was known to the decisionmakers at the time they decided to terminate him; (c) the discharge decision was motivated by protected concerted activity; and (d) Shahat would not have been discharged but for such activity. Because of those errors, the conclusion that Employer violated Section 8(a)(1) must be set aside.

### **STATEMENT OF THE CASE**

#### **A. Procedural History**

On November 29, 2016, Shahat filed an unfair labor practice charge claiming that the Employer had violated Section 8(a)(1) of the Act; he amended the charge on January 25, 2017. The Employer opposed the charge and the amended charge, denying any violations and demonstrating that it had complied with the law.

On March 31, 2017, the Regional Director for Region 12 issued a complaint alleging, in pertinent part, that Employer had violated Section 8(a)(1) of the Act by discharging Shahat. The Employer filed a Response, admitting Shahat had been employed and discharged for legitimate reasons but denying the allegations of wrongdoing and any violations of the Act.

An evidentiary hearing was conducted on October 30-November 1, 2016. The parties presented witnesses and documentary evidence in support of their respective positions and, thereafter, filed post-hearing briefs. The ALJ issued his Decision on February 1, 2018, recommending dismissal of three claims but then finding various facts and concluding Employer had violated Section 8(a)(1) by discharging Shahat because of his protected concerted activity.<sup>2</sup>

B. Facts.

i. Mitsubishi Hitachi Power Systems Americas, Inc.

Employer is in the business of designing, manufacturing, selling and installing large, complex and expensive gas turbines for power plants. The piping components of each turbine are critical to its operation because the piping is used to connect natural gas, lubrication oil, and cooling air to the various turbine components. Employer's group of "piping" engineers are critical to the success of each project because "piping" inaccuracies and imprecision not only can cause project failure (with associated losses of substantial revenues) but also risk the safety of personnel working in or around the equipment. Tr. 224-225.

Employer is an "equal employment opportunity" employer and has policies to ensure personnel are treated with respect, without regard to their protected characteristics and in compliance with law. Resp. Ex. 37, 38. The policies are communicated in a handbook and employees receive periodic training in them. The Employer's policies are overseen, in part, by the Human Resources department ("HR"). Brian Shannon ("Shannon") was the Vice President of Human Resources and was assisted, in part, by HR Manager Julie Hester ("Hester"). Tr. 375.

Employer has an "open door" policy by which any employee can talk to any other employee irrespective of level within the corporate hierarchy. The policy provides "transparency" and

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<sup>2</sup> General Counsel's complaint asserted various other claims but, since the ALJ recommended dismissal of such claims, they are not enumerated or discussed in this brief.



opportunities to address issues and fix any problems. Employees have successfully used the policy to resolve communications issues. Employer does not in any fashion limit or deter employee complaints. Tr. 225-226 (Mohajeri); 405-406 (Deen).

Employer's personnel are formally evaluated annually in writing. An employee's supervisor first prepares a draft evaluation which then is reviewed by the supervisor's supervisor and then by Human Resources before it is finalized, delivered to, and discussed with the employee. Tr. 50-51. Preparation of evaluations is a time-consuming process but Employer believes they are critical because evaluations can affect an employee's career path and they "help the employee to be on right track . . . communicating [Employer's] goal and objectives and explaining to them what needs to be done." Tr. 250 (Mohajeri). There are five overall evaluation grades that can be given in various evaluation categories, ranging from "Below Expectations" to "Needs Improvement" to "Meets Expectations" to "Exceeds Expectations" to "Outstanding Achievement." An employee who receives a less than "Meets" evaluation is placed on a performance improvement plan ("PIP"). Tr. 246-250 (Mohajeri); 376-378 (Shannon).

A PIP is prepared by the employee's supervisor and reviewed by the supervisor's supervisor. It contains tasks, goals and deadlines for the employee's actions during the PIP period, each of which is intended to improve performance. PIPs are used to address employee performance and behavior issues but a PIP is not a prerequisite to disciplining or to discharging an employee. PIPs can negatively impact an employee's career at Employer. Tr. 254-255 (Mohajeri); 491 (Deen); 342-343 (Hester); 381 (Shannon).

The Employer sometimes must discharge employees for poor performance. The decision is made by the employee's management in conjunction with HR in order to ensure the discharge is necessary, appropriate, proportional to the performance/behavior issues, and consistent with the Employer's past practices. Because of the seriousness of a discharge, and its obvious impact on

the employee, there is no required timeline, so the decisional process and its implementation may take weeks. Employees need not be disciplined before being discharged for poor performance. Tr. 343 (Hester); 382 (Shannon).

Employer's HR department investigates employee complaints. The nature and scope of an investigation depend on the nature of the complaint being investigated. The investigator interviews persons who are thought to have knowledge of the facts and reviews documents that could provide information about the issues. Shannon supervises the investigations and reviews tentative investigation conclusions and the investigator's draft report. If the investigation finds there has been a violation of Employer policies, corrective action is implemented. Tr. 379-381.

ii. Supervisor Mohajeri and Manager Deen.

In 2016, at the times of the events at issue, Shahat was supervised by Mohajeri who, in turn, was supervised by Deen.

Mohajeri is an Assistant Manager of Engineering responsible for the "piping" group. He manages the engineers doing the detailed piping design and engineering, including the preparation of their evaluations. Tr. 17. Mohajeri had approximately 12 subordinate employees in 2016, ten engineers and two interns. Tr. 332.

Mohajeri's management style was to work with subordinates to improve their skills and help them grow; he frequently goes to his supervisor (Deen) to ask about ways he can help develop his employees. Tr. 407 (Deen). One of Mohajeri's management methods was to use "individual performance plans" prepared for and discussed with each of his subordinate engineers at the start of every year. The plans not only set out Employer's and employee's goals for the coming year but also were used by Mohajeri in periodic progress meetings with the employee during the year. The individual performance plans also set the standards against which the employee's performance is measured at the annual year-end review. "Piping" engineering is critical to a project and, since

it is complex and extremely detailed, Mohajeri insists on such engineering accuracy and precision that some persons could view him as a “micromanager.” Tr. 226-229 (Mohajeri).

Mohajeri addresses performance issues with his engineers by coaching them to ensure they understand what is necessary to meet Employer's job performance expectations. He uses discipline as a last resort. Tr. 250-251 (Mohajeri)(“The approach is not to hammer the employees. We want to keep the morale. So our intention is to coach them . . .); 412 (Deen).

Mohajeri typically makes notes about his engineers' performance issues and his coachings; he does not make a note every time he criticizes or coaches an employee but only for the more serious events. The entries are made contemporaneously with the event being described. Mohajeri's notes about employee issues have the appearance of a timeline, and he uses them for all of his personnel who require coaching/counseling. Resp. Ex. 8 (Shahat timeline); 20 (timelines for other engineers in Mohajeri's group)<sup>3</sup>; Tr. 229-230 (Mohajeri).

Mohajeri's behavior and demeanor in the workplace have been described as fair, calm, and professional. He receives periodic performance evaluations by Employer and consistently has been graded as "Exceeds Expectations" or “Outstanding.” Mohajeri has improved the capabilities, responsiveness/timeliness and effectiveness of the “piping” group since he was hired. He has never been disciplined or considered for discipline by the Employer nor, prior to Shahat's July 11, 2016 complaint (discussed below), had he ever been accused of discrimination or harassment or retaliation. Tr. 230-231 (Mohajeri); 407-408, 429 (Deen); 383-384 (Shannon).

Deen was the Employer's “Senior Manager of Plant Engineering” in 2016. He was responsible for supervising certain “Engineering” departments, including Mohajeri's “piping”

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<sup>3</sup> The “timelines” for the other Mohajeri engineers were shorter than Shahat's because those employees either had fewer performance issues and/or they responded successfully to Mohajeri's coaching/counseling. Tr. 300 (Mohajeri).

group. Tr. 47. Deen was a calm, focused, and effective manager of personnel who has always behaved in a professional manner. Deen has received “Exceeds Expectations” performance evaluation grades. Tr. 384.

iii. Shahat's hiring, job performance and dismissal.

a. Shahat's hiring and the evolution of his duties.

Shahat was hired by Employer in July 2013 as a “Piping Project Engineer II.” He was interviewed by Deen, who recommended he be hired in part because the engineer showed a 3D model of piping that he claimed to have prepared. Tr. 430.

Shahat's expected duties are reflected in the job description for the position. Resp. Ex. 26. Mohajeri's 2015/2016 in-year Individual Performance Plan for Shahat showed the engineer's goals for the coming year. Resp. Ex. 7 (with Mohajeri's comments in the “Objective” sections of the document and Shahat's comments in “Performance Notes,” “What Could Have Gone Differently” and “Goals and Objectives Achieved” sections, Tr. 263-264).

However, Shahat's actual job duties had to be changed over time because of his inability or reluctance to perform the normal tasks. The changes were necessary in light of what tasks Shahat was willing to do and his ability to do them, because he became less effective and was slow in performing certain tasks so the work had to be moved to others. The limitations on Shahat's duties meant he was contributing less to the overall work of the group. The evolution of Shahat's duties was so dramatic that, at the time he left Employer, he was basically an administrator doing simple tasks which “were very basic . . . we couldn't really assign certain jobs to him because we wouldn't get it on time or get it out correctly.” Tr. 261 (Mohajeri); 435-436 (Deen).

b. Shahat's job performance.

Deen directly supervised Shahat until Mohajeri was hired a few months later. The manager observed that the engineer's job performance was not always satisfactory. Most notably, Deen

asked the engineer to prepare a "valve list" but found that Shahat was so slow and made so many errors that another engineer had to be assigned to finish the task.<sup>4</sup> Tr. 431-2 (Deen).

Deen continued to have regular contact with and observations of Shahat's performance even after Mohajeri was hired.<sup>5</sup> He observed that Shahat did not demonstrate skills he had claimed during the hiring process and, on other occasions, Shahat simply refused tasks that needed to be completed. For example, Shahat claimed during his job interview that he was skilled using 3D modeling software for piping but, after he was hired, he initially refused to do such work but later, after he began doing it, it was obvious he could not do it efficiently or accurately. (Notably, Employer's bad experience with Shahat's exaggeration of his skills during the interview resulted in a change in the hiring protocol for such positions: Employer thereafter did not accept job applicants' claims they could do 3D work but, rather, made them actually demonstrate their skills by passing a practical exam in order to get a job offer.) Tr. 431-432, 436-438 (Deen).

Mohajeri had contact with Shahat every day that they both were at work, providing the supervisor numerous opportunities to observe the engineer's performance. Tr. 259. The supervisor observed numerous performance deficiencies over time, and made contemporaneous notes about them, consistent with the supervisor's normal practice. Resp. Ex. 8; Tr. 31. Mohajeri's "timeline" for Shahat reflects the more significant performance issues the supervisor observed, including:

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<sup>4</sup> Shahat was not happy to learn Mohajeri would be his supervisor. Deen observed that he appeared upset, perhaps even angry, and demanded to know why he (Shahat) had not been considered for the position. Deen told Shahat that he did not have the necessary technical skills. It was Deen's impression that Shahat felt slighted and resented Mohajeri but the engineer's reaction to the Mohajeri hiring was not unusual: Shahat frequently asked about raises and promotions for which he was clearly not qualified. Tr. 432-433 (Deen).

<sup>5</sup> Deen often answered Shahat's questions about career advancement and once Deen wrote him a letter of recommendation in conjunction with his application for a University of Central Florida graduate study program which Shahat started in 2014. GC Ex. 18; Tr. 148 (Shahat). The letter was positive but focused on the engineer's skills related to graduate study and his learning ability, that is, Deen did not comment on Shahat's technical engineering skills and Deen would not have provided a similar letter to a potential Shahat employer. Deen's letter was written approximately two years before the end of Shahat's employment so it did not accurately describe the engineer's performance at the time he was discharged. Tr. 62, 434-435, 476 (Deen).

- On “multiple occasions,” Shahat’s shifting his tasks to other employees without approval, demonstrating an inability to prioritize his work, and doing personal work during business hours;
- Shahat’s numerous errors in reviewing/checking drawings to be sent for fabrication (6/9/16 and 6/21/16), Resp. Ex. 12, 13, 14; Tr. 267-273;
- Shahat’s inaccurate or incomplete work (2/24/16; 2/9/16; 6/9/16; 6/21/16; 6/23/16; 8/12/16); and
- Shahat’s refusal or failure to communicate about issues (7/6/16; 8/10/16).

*Id.* The "timeline" also reflects many of supervisor Mohajeri's coaching/counseling sessions with Shahat, including on April 12 and June 5, 2015, at "weekly meetings to... push him to finish his work" in late 2015, and on January 26, February 9, May 19 (the annual evaluation), June 9, June 21, June 23, August 10, and August 30, 2016 and "multiple occasions." *Id.* Deen observed many of the same Shahat performance issues, including Shahat's inaccuracies, untimely work, unauthorized delegation of assignments, and refusal to take ownership of matters. Tr. 444 (Deen).

Employer attempted to help Shahat improve his skills. He received training (including a week-long training program in 3D work) and regular coaching and counseling. Mohajeri periodically came to Deen to discuss Shahat's performance, seeking advice about how to motivate Shahat into better performance; the two of them were for a time “trying to redefine his job. Give him assignments that matched his skills.” Tr. 438 (Deen). Unfortunately, Deen and Mohajeri observed that their coaching/counseling of Shahat frequently was unsuccessful because he often resisted constructive criticism and would not take responsibility for his actions; the engineer frequently seemed "uncoachable." Tr. 261-262.

c. Shahat’s refusal to perform 3D work.

Mohajeri’s group did not have enough manpower in June 2015 so the supervisor asked Shahat to perform 3D work. Shahat refused, telling the supervisor it "was below him," despite the facts that (a) each of the engineers in Mohajeri's group was expected to do such tasks; (b) the job

description for Shahat's position had multiple references to 3D work, Resp. Ex. 26; and (c) 3D work was even done by supervisor Mohajeri when necessary. Tr. 36-39; 274-275.

Mohajeri prepared a "Disciplinary Action Notice" for Shahat dated June 3, 2015. Resp. Ex. 10. Mohajeri showed the draft discipline to Shahat and discussed it with him but, in order not to harm Shahat's career with Employer by finalizing and placing the "Notice" in the personnel file, Mohajeri offered Shahat a second chance and he took it, *i.e.*, he attempted 3D work. Mohajeri's "second chance" for Shahat was not required by Employer policies or normal practices—the supervisor could have immediately written-up Shahat but "[Mohajeri's] intention is to encourage people to help . . . we are not in the business of punishment." If the "Disciplinary Action Notice" had been finalized and placed in Shahat's file, it would have affected the engineer's career path at Employer. Tr. 36-39; 273-278.

Mohajeri prepared a June 5, 2015 memo documenting Shahat's refusal to do the 3D work, his "second chance" opportunity, and the disposition of the draft "Disciplinary Action Notice." Resp. Ex. 16. In fact, neither the draft June 3, 2015 "Notice" nor the June 5, 2015 document is in Shahat's personnel file, Tr. 39, 45, and neither affected Shahat's compensation or benefits. Mohajeri also prepared a memo to Deen about the draft discipline and its resolution; it not only addressed Shahat's refusal to perform 3D work but also noted that Shahat for several months had "consistently exhibit[ed] a poor performance and also [was] having difficulties following directions given to him." Resp. Ex. 17; Tr. 40; 278-280.

- d. Employer "bumps up" Shahat's 2016 evaluation to avoid having to give him a career-impacting performance improvement plan.

Shahat was given an annual evaluation in 2016. It was prepared in the normal manner, that is, Mohajeri prepared a draft and sent it to Deen for review. Resp. Ex. 9. Mohajeri initially gave Shahat an overall "Needs Improvement" rating, *Id.* at p. 5, but Deen noticed that Shahat was close

to an overall "Meets Expectations" assessment because of grades Mohajeri had given Shahat in the various subsections of the evaluation. Although Deen agreed with Mohajeri's "Needs Improvement" assessment of Shahat, Tr. 441, Deen thought modifying the draft evaluation to increase Shahat's overall grade to "Meets," so Shahat was not put on a PIP (as would be required if he was overall graded "Needs Improvement"), might better motivate improved performance. Mohajeri readily agreed, recognizing the evaluation was an important document and could impact the engineer's career path. Accordingly, Mohajeri adjusted various evaluation category grades to raise Shahat's overall grade, including increasing the "time management" score from "Needs Improvement" to "Meets," increasing the "creativity" score from "Meets" to "Exceeds Expectations," and increasing the "bench strength and teamwork" score from "Below Expectations" to "Needs Improvement." (The latter change was particularly important because, if Mohajeri had given him a "Below" in that category, it would have ended Shahat's career at Employer.) The final evaluation resulted in Shahat receiving an overall "Meets Expectations" rating. Resp. Ex. 18. However, Deen was concerned about the possibility of inconsistent messages in bumping Shahat to achieve a "Meets" grade so he told Shahat about the artificial increase in his overall evaluation grade. Tr. 29-31, 280-284 (Mohajeri); 441-443 (Deen).

Shahat's annual evaluation was delivered to him by Mohajeri on May 19, 2016. The supervisor told the engineer about what job performance improvements would be required, and that Shahat had been given a break in the critical "bench strength" category on the evaluation. At the end of the evaluation meeting, Shahat knew Employer believed there were significant issues with his performance. Tr. 283-286. Mohajeri's May 19, 2016 timeline entry concerning the evaluation and its delivery to Shahat is succinct and telling: "After discussing the year-end performances with Phil, it was decided to given (sic) [Shahat] one more break by giving him 'meets expectations' even though he is truly 'needs improvement'." Resp. Ex. 8.



Deen also talked to Shahat about the “bumped up” evaluation when the engineer came to him about a promotion or raise. Shahat said he had been receiving excellent performance reviews, but Deen responded “we cut you a break on your last performance review.” Tr. 443 (Deen).

Shahat’s performance did not improve after the “bumped up” evaluation. Mohajeri's timeline for the engineer (Resp. Ex. 8) continued to reflect performance problems requiring coaching, and Deen also observed on-going issues. Tr. 444 (Deen).

e. Shahat’s refusal of the supervisor’s instruction to relocate his cubicle.

In early Summer 2016, Mohajeri discussed with Deen the possibility of relocating “piping” engineers in order to place their individual work stations closer to Employer personnel with whom they had the most interactions and common tasks, thereby improving the group's efficiency. Approximately 6 or 8 personnel on Mohajeri’s team would change work stations. Deen approved the relocations, one of which was to move Shahat. If one of the engineers scheduled to move did not do so, then other personnel could not move. Tr. 288-290 (Mohajeri); 445-446 (Deen).

Mohajeri informed his engineering personnel about the cubicle relocations in July 2016, several weeks in advance of the anticipated move date; he told them the moves were intended to improve communications among team members. Tr. 155 (Shahat). Mohajeri formally notified Shahat of the date of his cubicle relocation on July 7, 2016 and confirmed it with an email. Resp. Ex. 19. Shortly thereafter on that day, Shahat told Mohajeri that he refused to move. Mohajeri again explained the purpose for the moves and asked Shahat if he understood that refusing his supervisor's direct request was insubordination. Shahat said Mohajeri did not have authority over him and said he (Shahat) wanted to speak to Deen. Mohajeri did not discourage or prohibit Shahat from talking to Deen and, in fact, told the engineer he certainly could speak to Deen because of the open door policy. Mohajeri was not angry or upset because Shahat wanted to meet with the manager. Tr. 289-292 (Mohajeri).

Shahat met with Deen on July 7, 2016 to complain that Mohajeri had not considered the engineer's opinion about the cubicle moves and he wanted to stay at his current work location because he liked the view and because it was better for Shahat studying for his Master's degree. Shahat asked Deen essentially "what should I do?" and Deen told him he should move because employees do not own the offices and "where you need to sit is where your boss tells you to sit." The Deen-Shahat meeting about the change in cubicles ended by Deen making it plain he was disappointed in Shahat and "you better think about it." Deen believes he left the impression with Shahat that not relocating was a significant issue. Tr. 446-448 (Deen).

Mohajeri prepared a notice of discipline for Shahat arising from the engineer's refusal to relocate; it noted that Shahat understood Mohajeri's request and the refusal was a recurring situation (referring to Shahat's refusal to do 3D work the prior year). Resp. Ex. 11. Deen reviewed and approved the notice but it was never delivered because, on the next day Shahat was at work (July 11, 2016), he submitted a written complaint about Mohajeri to HR, and HR instructed that Shahat not be relocated.<sup>6</sup> Tr. 41-42, 45, 293- (Mohajeri); Tr. 448-449 (Deen).

f. Shahat's discharge for poor performance.

Deen first began to think seriously about discharging Shahat at the time of his annual evaluation in May 2016 (the evaluation in which the initial draft was an overall Shahat "Needs Improvement"). Tr. 296 (Mohajeri); 457 (Deen). Deen finally decided on July 7, 2016 that Shahat must be discharged after he refused to relocate his cubicle. Although Deen initially thought about disciplining Shahat, and Mohajeri had begun to prepare a "Disciplinary Action Notice," Deen decided discharge was more appropriate because Shahat had not improved his job performance

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<sup>6</sup> Shahat never actually changed cubicles, thereby frustrating Employer's plan to improve the efficiency of the "piping" group: Shahat's refusal to move caused a "domino effect" whereby other personnel could not move to new locations. Tr. 290 (Mohajeri); 449 (Deen)("it put everything to a stop").

since his evaluation (despite subsequent warnings and counselings) and because of his second instance of refusing a direct order of his supervisor. Tr. 457-458 (Deen).

Deen made the Shahat discharge decision on July 7, 2016, the day Shahat came to see him about the cubicle relocation. Tr. 457. On that day, or the following day, Deen spoke to Shannon in HR about Shahat's marginal evaluation in May, his failure to improve, and his second refusal to obey an order of his supervisor. Deen told Shannon something like "we just need to cut our losses and move on." Tr. 457. Shannon agreed, and told Deen HR would begin processing the papers to separate Shahat. Tr. 457-458 (Deen); 387-388 (Shannon).

Deen made the decision to discharge Shahat on behalf of Engineering. Tr. 50, 457 (Deen). Shahat had not complained about Mohajeri at the time Deen made the decision to dismiss Shahat. In fact, Deen first learned of Shahat's complaint on July 11 (Shahat's first day at work after their cubicle conversation on July 7) at a meeting called by Shahat with an Outlook meeting invitation. Resp. Ex. 28. Shahat's continuing unsatisfactory job performance was the only reason Shahat was discharged. Tr. 52, 459 (Deen); 99 (Shannon).

Deen did not consider disciplining Shahat or putting him on a performance improvement plan as alternatives to discharge because such measures seemed futile in light of Employer's prior (and unsuccessful) efforts to coach Shahat to better performance. Although PIPs and discipline are intended to motivate improved performance, Employer's numerous but unsuccessful prior coachings/counselings of Shahat, and its repeated efforts to motivate him, convinced Deen there was not any chance for improvement. Tr. 464 (Deen).

Shahat submitted his written complaint about Mohajeri to HR on July 11, 2016. Later that week, on July 14, 2016, Deen, Shannon and two other executives met to consider whether Shahat should be immediately terminated now that he had submitted a complaint. Resp. Ex. 39 (Outlook invitation). (It is important to note that there were two "discharge decisions" as to Shahat: the first

was the decision to discharge him and the second was the decision when to release him in light of his complaint, Tr. 100-101 (Shannon); the second decision was the topic of the July 14, 2016 meeting.) It was concluded that Shahat should not then be separated because it would appear retaliatory and inconsistent with Employer's "open door" policy and, further, an immediate separation would not allow Employer to investigate Shahat's allegations. It was decided Shahat should not be required to relocate to a different cubicle and the implementation of the July 7 discharge decision would be postponed until the investigation had been completed so, then, Employer could revisit the decision if there was evidence of Mohajeri wrongdoing. Tr. 464-465 (Deen); 389-390 (Shannon).

Shahat was informed of his discharge in October 2016 at the conclusion of Employer's investigation of his complaint (discussed below). Deen decided to implement Shahat's dismissal at that time because his performance had not improved since the decision had been made in early July and, in fact, it had deteriorated and he then was performing non-engineering "administrative" tasks. Tr. 60, 436 (Deen), Employer followed its normal policies and practices in making and implementing the decision to discharge Shahat. Tr. 465 (Deen); 391 (Shannon).

Deen, Shannon, and Hester informed Shahat of his separation; Mohajeri was not present because he was on a business trip. Shahat was told he was being dismissed because of his continuing unsatisfactory performance. He asked if the discharge was because of Mohajeri but was told that it was not, that he was being released "based on his performance and the fact that he was not executing the responsibilities that were given to him." Tr. 466. Shahat did not then complain about Mohajeri or his management style nor did he then claim that other employees were concerned about Mohajeri or his management style. Shahat was listed as "ineligible" for rehire because of his poor performance. Tr. 465-466 (Deen).

iv. Shahat's complaint to Employer.

On July 11, 2016, Shahat submitted his complaint about Mohajeri, first meeting with Deen showed him two documents. The meeting was the result of Shahat's Outlook invitation to Deen, an invitation with a subject line of "[CONFIDENTIAL] Notification of Management Complaint." Resp. Ex. 28. Shahat then made it plain to Deen that his complaint was triggered by Mohajeri's instruction to relocate his cubicle. He began his conversation with Deen by asking "do I still have to change cubicles?" (referring to the Shahat-Deen conversation on July 7). Deen replied that nothing had changed and the engineer should already have moved and, then, Shahat said essentially "I have to do this" and handed Deen two documents. Deen quickly scanned them and, though he was surprised by their content, he immediately recognized it was an issue requiring the attention of HR so Deen took Shahat to that department.<sup>7</sup> TR. 54-56; 459-463 (Deen).

One of the Shahat documents given to Deen in the July 11 meeting was a memo addressed to Deen. It set forth Shahat's personal complaints about Mohajeri, alleging Shahat had been subject to disrespect and verbal abuse from the supervisor. Resp. Ex. 29.

The second document shown by Shahat to Deen at their July 11 meeting was a memo addressed to HR, describing Shahat's personal unhappiness with Mohajeri. Resp. Ex. 21. The memo accused Mohajeri of refusing to provide Shahat a reference letter, of forcing him to do 3D work and relocating his cubicle, of criticizing him for errors in checking drawings, and of disrespectful conduct in connection with an off-premises music concert, Shahat's sneakers, and a birthday card. *Id.*<sup>8</sup>

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<sup>7</sup> Deen was surprised by Shahat's complaint documents. No other employees had ever complained to Deen about Mohajeri and the manager always had observed the supervisor to be professional, fair, and supportive of his subordinates. Shahat's allegations about Mohajeri were "in conflict with everything that I knew and had seen how Mr. Mohajeri had conducted himself at work." Tr. 468.

<sup>8</sup> One of the attachments to Shahat's memo to HR actually contradicted an allegation in it: although Shahat's memo claimed that co-worker Meysam Abdollahi had not been notified of the relocation, GC Ex. 9 (seventh bullet point),

Mohajeri first learned about Shahat's complaint on July 11, 2016. Tr. 32, 301-302. The supervisor was not angry but merely surprised and confused because Shahat never previously had expressed such thoughts. *Id.*

Mohajeri and Deen never felt or showed irritation or anger or "attitude" to Shahat after they learned about the complaint, nor did they treat the engineer differently thereafter, i.e., "[i]t was business as usual." Tr. 302-303 (Mohajeri); 471-472 (Deen). Mohajeri was not concerned that Shahat's complaint would negatively impact the supervisor's future because he (Mohajeri) was confident that he had done nothing wrong and "[b]ecause I'm honest in what I do." Tr. 303. Deen never observed any Mohajeri anger or irritation to Shahat, or different treatment of him, after Shahat submitted his complaint; the supervisor only seemed confused, thinking that he (Mohajeri) perhaps had not worked hard enough to motivate and coach Shahat. Tr. 472-473 (Deen).

v. Employer's investigation of Shahat's complaint.

Employer's investigation of Shahat's complaint was conducted by Hester with Shannon's supervision. Hester interviewed witnesses thought to have knowledge of Shahat's allegations, reviewed documents, and formulated a report. Shannon communicated with Hester about the investigation and the information she gathered.<sup>9</sup> Tr. 393-394.

Hester met with Shahat on July 11, 2016, the day he filed his complaint with HR. He told her Mohajeri had been rude to Shahat, had not been open to Shahat's opinions, and had asked Shahat to make up work when he took a vacation day, and that Shahat did not like Mohajeri's

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the July 7 email attached to the complaint by Shahat shows exactly the contrary, i.e., Shahat and Abdollahi were notified together about the cubicle swap. GC Ex. 42.

<sup>9</sup> Shannon and Hester thought she interviewed all appropriate personnel during the investigation. She did not speak to former employee Amasis Yazid (who was no longer employed at the time of the interviews) nor to other engineers reporting to Mohajeri not only because Shahat's complaint alleged discrete, specific issues personal to Shahat but also because he refused to provide her names of potential witnesses and said he did not want to speak on behalf of other employees. Tr. 74, 358.

“management style.” Resp. Ex. 33. Hester asked Shahat if there were other employees who felt they were being mistreated by Mohajeri so she could interview them to find out if there was a problem with the supervisor and, if so, the nature and extent of such issues. However, Shahat refused to provide her with names, stating he did not want to speak on behalf of other people and “he couldn’t speak for others of the team.” Tr. 71-72, 349 (Hester). At the end of the meeting, Hester told Shahat that Employer would investigate his allegations. Hester made a note of her meeting with Shahat. Resp. Ex. 33. Hester tried to stay neutral during the meeting and did not comment on/characterize Shahat’s allegations. Tr. 347.

Mohajeri prepared for HR a written response to Shahat's complaint. Resp. Ex. 15; Tr. 34-35. The supervisor explained in it that (a) he was not qualified to write a recommendation for Shahat because of his limited work experience with the engineer as of that time, so he encouraged him to get a recommendation from Deen (which Shahat actually did); (b) Shahat was required to do 3D work because it was part of his job, as with all “piping” engineers; (c) Mohajeri had, in fact, criticized Shahat’s work checking drawings because he had made errors as the final approver before drawings were to be released for fabrication, but Mohajeri had not become upset; (d) the supervisor had not engaged in the “concert,” “shoes” and “birthday card” conduct Shahat alleged; and (e) the cubicle relocations were necessary to improve communications as the “piping” group expanded. *Id.*; Tr. 305-10 (Mohajeri). Mohajeri’s response was considered by investigator Hester. Tr. 359.

Deen also submitted a written response to Shahat's memo. Resp. Ex. 30; Tr. 56-57. The manager reported, in part, that he had “never witnessed any behavior from Arash Mohajeri that remotely resembles bullying or intimidation toward Mr. Shahat or any other member of this organization. What I have directly witnessed from Arash is an individual who treats those around him in a professional manner.” Resp. Ex. 30.

Hester learned in her investigation that Shahat had performance issues, he had difficulty accepting criticism, and he often would not take responsibility for his actions. She also observed that Deen and Mohajeri appeared confused with the filing of Shahat's complaint because they said they had tried to work hard with the engineer and thought they had been accommodating of his school schedule. Hester did not have any indication that Deen or Mohajeri were angry because of Shahat's complaint nor did they express to her any suggestion that he should be disciplined or fired because of it. Hester made a note of her meeting with the managers. Resp. Ex. 36; Tr. 357.

Hester spoke to Shahat on several occasions after her initial interview of him. He was checking on the progress of her investigation but he never provided any additional information to support his claims nor did he ever provide the names of other persons who might have knowledge of his claims or of disrespect by Mohajeri. Tr. 74, 349 (Hester).

Hester prepared a report describing her activities and summarizing her findings.<sup>10</sup> She used the Department of Labor's "severe and pervasive" standard for assessing whether Shahat had been subjected to a hostile environment. Resp. Ex. 36 (report); 35 (DOL "Workplace Harassment" publication). Employer's investigation concluded that Shahat had not been subjected to conduct in violation of Employer policy but, in fact, the Shahat-Mohajeri relationship seemed to involve a personality conflict.<sup>11</sup> Resp. Ex. 36; Tr. 360-364, 367-368 (Hester); 393-394 (Shannon).

vi. The ALJ's Decision.

The ALJ made detailed findings of fact and conclusions of law. Although he recommended dismissal of three claims asserted by General Counsel, he found and concluded that Shahat had

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<sup>10</sup> Hester's investigation was not completed for a few weeks because major HR projects were then underway and because of the travel schedules of the people involved. Tr. 353. Employer had no required deadlines/timeframes for the completion of internal investigations. Tr. 365.

<sup>11</sup> The outcome of the investigation was determined by Shannon and Hester. Although engineers obviously provided information during the investigation, they were not involved in deciding its outcome. Tr. 361 (Hester).



engaged in “concerted” activity, that Employer discharged him because of it, and that Employer had not established that Shahat would have been discharged absent “concerted” activity. The ALJ found and concluded that Employer had violated Section 8(a)(1) and ordered it to cease and desist its illegal activities and to take affirmative remedial measures.

**QUESTIONS PRESENTED**  
**(WITH REFERENCE TO EXCEPTIONS TO WHICH THEY RELATE)**

1. Whether the ALJ erred as a matter of law by concluding that Shahat had engaged in activity that was “concerted” within the meaning of the Act and Board precedent? Exceptions 1, 4, 5, 6, 7 and 20.

2. Whether the ALJ erred by finding that the decision to discharge Shahat was made on July 14, 2016 and not during the prior week? Exceptions 8, 9, 10, 11 and 12.

3. Whether the ALJ erred as a matter of law by finding that Shahat’s discharge by Employer was motivated by his protected concerted activity and then concluding that the discharge thereby violated Section 8(a)(1)? Exceptions 2, 4, 13, 14, 15, 16, 17, 18 and 20.

4. Whether the ALJ erred as a matter of law by finding that Employer would not have discharged Shahat irrespective of any protected concerted activity and then concluding that Employer had not established a *Wright Line* defense? Exceptions 3, 19 and 20.

**ARGUMENT**

A. Shahat did not engage in “concerted” activity (Exceptions 1, 4, 5, 6, 7 and 20).

i. Applicable law.

Section 7 of the Act provides in part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. §157.

In order to be protected under Section 7, an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." The elements are closely related but also analytically distinct. *See Summit Regional Medical Center*, 357 NLRB No. 134, (2011). The "concerted" and "mutual aid or protection" elements are analyzed using an objective standard. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014).

Activity is "concerted" if the employee's actions may be linked to his co-workers. *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984); *Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984) (*Meyers I*), *remanded sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *supplemented Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986) (*Meyers II*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

"Concerted" activities are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. In *Meyers II*, the Board again approved the proposition that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." 281 NLRB at 887, *quoting Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)(citations omitted) (emphasis added). The analysis is a factual one based on the totality of the record evidence; as noted by Member Miscimarra in *Fresh and Easy*, *Meyers II* found that the relevant considerations "included, for example, (a) whether other employees authorized or instructed the individual to speak for them; (b) whether other employees 'were aware of and supported' the individual's presentation to management; and (c) whether the individual previously discussed a 'common complaint' with other employees who, in turn, 'refrained from making [their] own ...

complaint'." 361 NLRB No. 12 (Miscimarra, concurring in part and dissenting in part)(citations omitted).

However, activities involving co-workers are not necessarily "concerted." As the Third Circuit noted, "[A]ctivity which consists of mere talk must, in order to be protected, be talk looking towards group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more than likely to be mere 'gripping'." *Mushroom*, 330 F.2d at 685. Further, the Eleventh Circuit has noted, "[p]urely personal gripping does not fall within the scope of protected concerted activity." *Rockwell Int'l Corp. v. NLRB*, 814 F.2d 1530, 1536 (11<sup>th</sup> Cir. 1987).<sup>12</sup> See also *NLRB v. Deauville Hotel*, 751 F.2d 1562, 1571 (11<sup>th</sup> Cir. 1985)(holding that employee complaint about assignment to a lower-ranking job was not protected concerted activity); *Praxair Distribution, Inc.*, 358 NLRB No. 7 (2012)(adopting holding that "all of [charging party's] complaints about [a co-worker's] conduct are personal in nature").

ii. The ALJ erred in concluding that Shahat's activities were "concerted."

The ALJ's conclusion that Shahat's activities were "concerted" was based on Shahat's testimony of his conversations with co-workers. Dec. 33 at 31. However, an examination of the record evidence will show that Shahat specifically denied that he was speaking for others and that, when talking to co-workers, he was primarily griping about how he was treated. Thus, the ALJ erred in finding and concluding that Shahat was acting in a "concerted" fashion.

Perhaps most significantly, the ALJ overlooked testimony that Shahat expressly disclaimed acting with or for others. HR investigator Hester's undisputed testimony was that, in his July 11,

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<sup>12</sup> Decisions of the United States of Court of Appeals for the Eleventh Circuit are particularly relevant because any review of a Board decision may be conducted by that court.

2016 conversation with her, Shahat did not give her the names of co-workers with similar concerns or who could support his allegations but said he did not want to speak on behalf of others and he “cannot speak on behalf of them,” Tr. 349, and he “couldn't speak for others of the team. He came to [Hester] for him”! Tr. 71 (Hester)(emphases added).<sup>13</sup> Shahat never denied at trial that he made such statements to Hester and, thus, it must be concluded he had not engaged in “concerted” activity. *See, e.g., Plumbers Local 412*, 328 NLRB 1079, 1083 (1999)(finding no “concerted” activity in part because charging party expressly “negated this object”).

The credible record evidence also confirms Shahat did not engage in “concerted” activity, that is, the evidence reflects he always was acting in his own interest and not seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 US 556, 565 (1978). For example, Shahat’s testimony about his communications with co-workers shows that he primarily was concerned about his situation, such as his workload (given to him by Mohajeri). Tr. 118-119.<sup>14</sup> And, although there were two sentences of Shahat’s long July 11, 2016 written complaint making reference to other employees, Resp. Ex. 21, the writing clearly focused on him and his problems, griping about how Mohajeri allegedly had disrespected him and his sneakers and his signature on a birthday card; Shahat clearly was unconcerned with co-workers. Similarly, Shahat’s statements to Hester during their July 11, 2016 conversation, reported in her contemporaneous notes, have no mention of co-workers but reflect only the selfish, self-centered

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<sup>13</sup> The ALJ misunderstood Employer’s concern about Shahat’s refusal to cooperate in the investigation. The ALJ erred in thinking that Employer was arguing Shahat’s refusal to provide names of potential witnesses meant his communications with co-workers were not concerted. Dec. 34 at fn. 32. However, the “concerted” contention fails for other reasons (discussed above): what Employer contends is that Shahat’s refusal to provide the information impaired its ability to effectively investigate his claims.

<sup>14</sup> There was testimony that Mohajeri was strict and not receptive of opinions in dealing with his engineer subordinates, that is, he exhibited a “my way or the highway” approach to work issues. However, such an approach to technical matters is not surprising given the importance of “piping” to Employer projects and the engineering detail and precision required in such work, and the fact that Mohajeri was ultimately responsible for the group’s work.

nature of Shahat's concerns: he complained about Mohajeri being rude to him, about Mohajeri not being open to suggestions from him, about Mohajeri's work requests causing stress on him, about Mohajeri requiring 3D modelling not within his duties, and how he did not like Mohajeri's management style. Resp. Ex. 33 (emphases added). Further, the timing of Shahat's complaints to Employer show he was pursuing only his interests: he claims to have complained to Mohajeri when he received his 2016 annual evaluation (immediately after the supervisor told Shahat that significant job performance improvements were required)<sup>15</sup> and again on July 11, 2016 (shortly after he had refused a direct order for the second time in 16 months and knew his job might be in jeopardy). In contrast, there was no evidence that Shahat asked other employees to support him or that they ever wanted or expected him to speak for them or that he asked them to do anything or that they asked Shahat to do anything.

Further, there was no evidence that Shahat was speaking to co-workers in anticipation of group action rather than them simply airing ordinary gripes about perceived Mohajeri disrespect. Shahat's description of his conversations with co-workers showed they did talk about Mohajeri but there was no indication that any group action was being considered or that the co-workers knew of (much less sought or consented to) Shahat's communications to management. Tr. 116-123. Such testimony should lead to the same conclusion as was reached by the *Mushroom* court, finding employee conversations were not "concerted" because "it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to." *Mushroom*, 330 F.2d at 685; *Deauville Hotel*, 751 F.2d at 1571 (holding that "gripping is not a protected activity," noting "[I]t must appear at the very least that it [gripping and complaining] was

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<sup>15</sup> Mohajeri denies that Shahat made any such complaint, Tr. 284, but, as discussed below, the ALJ erroneously discounted Mohajeri's testimony because it was "tentative." Dec. 10 at fn. 15.

engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees”)(citations omitted); *Plumbers Local 412*, 328 NLRB at 1083 (finding no “concerted activity” in part because employee was “in pursuit of her personal interest” and “did not seek to initiate, induce or prepare for group action” when she met with co-workers). Shahat’s conversations with co-workers were not “concerted.”

Simply put, the totality of the evidence does not show that Shahat’s activities were “concerted” or “protected,” and the ALJ erred in so finding and concluding.

B. The discharge decision was made by Deen and Shannon **before** they knew of any Shahat complaint. (Exceptions 8, 9, 10, 11 and 12)

The ALJ erred in finding that the decision to discharge Shahat was made after he submitted his July 11, 2016 written complaint. Dec. 17 at 9-17; 34 at 26-36. The error is significant because a finding/conclusion that the decision was made after the complaint is the necessary predicate to the ALJ’s subsequent erroneous finding/conclusion that the discharge decision was because of the complaint.

The testimony at trial was:

(a) Deen and Shannon made the decision to discharge Shahat, Tr. 457-458 (Deen); 387-388 (Shannon);

(b) Deen and Shannon did not know, prior to Shahat’s written complaint on July 11, 2016, that Shahat had or had made a complaint about Mohajeri or Employer, Tr. 459, 467 (Deen); 393 (Shannon);<sup>16</sup>

(c) Deen made the decision to discharge Shahat on July 7, 2016, Tr. 457;

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<sup>16</sup> The ALJ found that there were no Shahat complaints to Mohajeri or company management prior to mid-May 2016 (apparently a reference to the date on which Shahat’s annual evaluation was delivered to him). Dec. 8 at 39-42. And, importantly, there was no evidence Mohajeri told Deen or Shannon of Shahat’s alleged complaint during the delivery of Shahat’s annual evaluation (a complaint that Mohajeri denies was made, Tr. 284). Further, Shahat testified that Deen was surprised when the engineer handed Deen the two complaint documents on July 11, Tr. 125, and Shahat admitted that prior to July 11 he never previously had informed Deen of the matters discussed in Shahat’s memos. Tr. 149, ll. 5-11 (Shahat). Finally, Deen and Shannon testified without contradiction that they did not know of Shahat’s dissatisfactions. Tr. 459, 467 (Deen); 393 (Shannon).

(d) on July 7 or July 8, 2016, Deen and Shannon met to discuss Deen's decision, and they agreed on that Shahat should be discharged, Tr. 457-458 (Deen); 387-388 (Shannon);

(e) on July 8, 2016, Shannon committed to having Human Resources prepare the paperwork necessary to implement Shahat's discharge, Tr. 387-388;

(f) Shahat's written complaint was received by Employer on July 11, 2016;

(g) there were two decisions as to Shahat's separation from Employer: first, the decision whether to discharge him and, second, the decision when to separate him, Tr. 464-465 (Deen); 389-390 (Shannon);

(h) Deen and Shannon met with other executives on July 14, 2016 to discuss the timing of Shahat's discharge, and it was decided that implementation of the earlier discharge decision would be postponed until Employer concluded its investigation of Shahat's July 11, 2016 complaint, *Id.*; and

(i) Shahat was discharged shortly after Employer completed the investigation of his complaint, Tr. 60.

In light of that evidence, the ALJ erred in finding and concluding that the decision to discharge Shahat was made on July 14, 2016 rather than the prior week. The ALJ's overall erroneous findings/conclusions were based upon the underlying errors that led to it.

The ALJ erred by discrediting the testimony of witnesses Deen and Shannon concerning the date and the manner of making the decisions about Shahat's discharge. Of course, credibility determinations typically rely on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole."

*See, e.g., Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014)(citations omitted).<sup>17</sup>

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<sup>17</sup> The General Counsel's case relied on Shahat's testimony because there were no witnesses corroborating his versions of critical events. However, the transcript of Shahat's testimony shows he was not a credible witness. The transcript reflects his hyperbole, his attempts to volunteer information or argue with the examiner, and his statements conflicting directly both with his own statements, the testimony of other witnesses, exhibits, and simple logic, thereby making large portions of his testimony simply unbelievable. For example, Shahat testified that, when he first was interviewed by Hester about his written complaint on July 11, 2016, she reacted to his memo with comments such as "oh my God, oh my God. This is bad." Tr. 128 (Shahat). Shahat would have the Board believe that an experienced HR manager would, upon her first reading of Shahat's memo and without further inquiry, immediately conclude that his claims about such things as routine work assignments, "sneakers" and a birthday card were horrendous and unacceptable. It is unbelievable to think any HR professional would have made such comments.

Members of the Board obviously cannot assess the demeanor of witnesses they did not observe, but the transcript readily reflects that the credibility of Deen, Shannon and Mohajeri. They testified easily and readily, providing long narrative responses to open-ended questions without having to be given or led to an answer, particularly questions asking for explanations of their actions/decisions and rationales/thought-processes, and irrespective of the identity of the interrogator (Employer counsel, counsel for the General Counsel, or the ALJ). Those witnesses responded directly to questions in a spontaneous, authentic, unrehearsed fashion (e.g., “Oh yes, this has nothing to do with the complaint,” Tr. 298 (Mohajeri), and readily made admissions on cross-examination without evasion or asking for clarification or claiming loss of recall (e.g., Mohajeri admitting that, as senior person in “piping,” he was ultimately responsible for all drawing errors, Tr. 323), and they readily acknowledged and resisted a “guess” (e.g., Deen stating “A. Again, this is speculative but—I don’t know” in response to a question from Employer counsel, Tr. 438, l. 11). The witnesses forthrightly addressed the occasional questions from the Court (e.g., Mohajeri explaining several exhibits, Tr. 338-339).

The ALJ erroneously discredited certain portions of the Deen and Shannon testimony because it was not contained in, or supposedly was inconsistent with, their affidavits prepared by

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Further, Shahat’s inconsistencies make it plain that his version of the “cubicle” incident cannot be believed. For example, though he testified he did not refuse to change cubicles, and “I had no objection,” Tr. 156, such testimony is belied by his July 11, 2016 written HR complaint in which he says in part “I unfortunately will not be able to go through with the change Mr. Arash has mandated . . .” Resp. Ex. 21 at p. 2. And, though he testified on direct examination that he was not given a reason for the relocation, he admitted on cross-examination that Mohajeri “said something about the communications between team members.” Tr. 155 (Shahat). Finally, Shahat testified that moving his cubicle was not a big issue, Tr. 158, but his complaint makes it plain the relocation was very important to him for various reasons personal to Shahat. Resp. Ex. 21 at p. 2. (The ALJ found that Shahat in fact did refuse to relocate and recommended dismissal of the Section 8(a)(1) claim related to the “cubicle” incident. Dec. 28-30.)

Finally, Shahat’s testimony about several years of disrespect and bullying cannot be believed. It simply is illogical. Although Shahat testified he had had periodic communications with Employer HR personnel Shannon and Hester, Tr. 146-147, and Shahat liked and trusted Deen, Tr. 149 (Shahat), Shahat admitted he never sought HR’s or Deen’s advice or assistance about Mohajeri prior to his refusing to move his cubicle on July 7, 2016 and his complaint on July 11, 2016. Tr. 149 and 151. Shahat’s failure to seek help (particularly from his trusted advisor, Deen) shows there was no actual Mohajeri “disrespect” or “bullying.”



the General Counsel during the investigation of Shahat's charge. Dec. 13 at fn. 18; 17 at fn. 20. However, as the General Counsel's own examination of the witnesses at the hearing established, the witnesses being interviewed were asked to provide information in response to specific questions posed by counsel for the General Counsel; as Deen testified, "I answered the questions that were asked of me." Tr. 483; 485 ("Q. You didn't tell me [counsel for the General Counsel, who both conducted the investigation and was lead counsel at trial] there was a separate meeting on July 7<sup>th</sup>. A. I was answering the questions that I was asked."). Significantly, there was no evidence presented at trial that the witnesses were called upon during their interviews to answer questions supplying information the ALJ thought should have been in their affidavits.<sup>18</sup> Further, any affidavit omissions or apparent discrepancies are easily understood in light of common experience: the witnesses were facing interrogation by a Government official and went into the investigatory interviews "cold" without knowing what questions they would be asked, and their memories were "jogged" after the interviews. *See, e.g.*, Tr. 396 (Shannon). So it is perfectly plausible to believe that, if Deen and Shannon were asked at trial open-ended questions calling for narrative responses, they would provide details not sought by specific questions posed at the investigatory interviews. Finally, comparison of Shannon's trial testimony and affidavit testimony shows there was no inconsistency; he said that the discharge decision was made in early July but the decision as to the precise date to execute/implement that decision was made shortly before Shahat actually was released in October. Tr. 100-101; 390 (Shannon).<sup>19</sup>

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<sup>18</sup> It is conceivable that, during the investigatory interviews, Deen and Shannon were asked very specific leading questions, calling for "yes or no" answers, as were consistently asked by counsel for the General Counsel at trial, that is, the investigation would not have elicited the narrative answers given at trial.

<sup>19</sup> The ALJ discredited Deen's testimony concerning a July 7, 2016 Deen meeting with Shahat. Dec. 13 at fn. 18. The ALJ concluded there was not such meeting based on his refusal to believe Deen because, in part, the meeting was not mentioned in Deen's affidavit given to the General Counsel. The ALJ's conclusion about Deen's credibility and the meeting is important because it colors the ALJ's overall assessment of the evidence, leading to his erroneous conclusion that the discharge decision was not made until after Shahat's July 11 complaint. The "absence from the affidavit" issue is addressed above. Further, in disbelieving Deen and choosing to believe Shahat about a July 7

Further, the ALJ erred in finding that the discharge decision was made on July 14, 2016, at a meeting of management. Dec. 17 at 4-17. There simply is no record evidence showing that the discharge decision—as opposed to timing for implementing that decision and separating Shahat—was discussed at that meeting. Three witnesses testified about the July 14, 2016 event. Mohajeri said he sent the meeting invitation but could not recall if he actually attended. Tr. 33. (The invitation was ambiguous, with a “Piping Group’s Path Forward” subject line. Resp. Ex. 39.) Deen said “after [Shahat’s July 11] complaint was submitted, yeah, we had kind of already decided to move forward with termination, but we wanted to make sure that we were handling that correctly. So there was a meeting on the 14th of July to discuss how do we—what do we do with our plans given the fact that we’ve got a complaint now.” Tr. 464. And Shannon said he told the attendees that Employer was not going to take action against Shahat until the investigation had been completed. Tr. 389-390. There was no evidence that the discharge decision was made at that event nor was there any evidence about that event which was inconsistent with Deen’s and Shannon’s testimony that the discharge decision had been made the prior week. Thus, there was no basis for the ALJ to conclude that Employer decided to terminate Shahat on July 14, 2016 after he submitted his complaint.

The preponderance of the evidence shows that the decision to discharge Shahat was made before the decisionmakers had knowledge of his complaint about Mohajeri. Although Deen had been considering discharging Shahat since at least May 2016 (when the engineer had been given the “bumped up” evaluation), it was not until Shahat refused a direct order on July 7, 2016 that Deen finally but reluctantly realized that separation was inevitable and went to Shannon in HR to

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meeting, the ALJ rejected specific, detailed Deen testimony about his conversation with Shahat on that date, Tr. 446-448, and accepted the testimony of Shahat who first said on cross-examination that he did not recall any such meeting, Tr. 160, but later said (when questioned by General Counsel) “No” when asked if there was a meeting. Tr. 496-497. The ALJ thus erred by accepting Shahat’s one-word denial and rejecting Deen’s detailed description of the event.

begin the process of implementing the dismissal. Deen and Shannon simply did not know of Shahat's complaint when the critical decision was made.

C. General Counsel did not prove that Shahat's discharge by Employer was motivated by protected concerted activity. (Exceptions 2, 4, 13, 14, 15, 16, 17, 18 and 20)

i. Applicable law.

The right to engage in concerted activities is protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. §158(a)(1). Thus, an employer who discharges an employee for engaging in concerted activities protected by the Act violates Section 8(a)(1). *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195 (D.C. Cir. 2005).

In order to establish a Section 8(a)(1) violation, the General Counsel first must make a *prima facie* showing that the aggrieved employee had engaged in protected concerted conduct, the employer was aware of it, and the protected activity was a motivating factor in the employer's decision to take adverse action. *Id.* See also *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); *Meyers I*, 268 NLRB at 497. If the General Counsel makes such a showing, the employer may rebut the inference by showing by a preponderance of evidence that the same action would have taken place in the absence of the protected conduct. *Id.*

ii. There is no credible evidence that any Shahat activity (even if presumed to be "concerted") was any factor in Employer's discharge decision.

There was no direct evidence of any Employer motivation to discharge Shahat because of concerted activity. And the circumstantial evidence shows that Employer discharged him for legitimate business reasons related to his continuing unsatisfactory job performance. The ALJ erred in finding and concluding to the contrary.

Again, a careful examination of the facts leads to the correct conclusion. Shahat's unsatisfactory job performance, and Employer's on-going dissatisfaction with it and unsuccessful attempts to remedy it, are largely undisputed.<sup>20</sup> For example, it was undisputed that:

- (a) Shahat had documented job performance issues for at least 15 months prior to his July 11, 2016 written complaint to Employer, *see, e.g.*, Tr. 431-432; Resp. Ex. 8;
- (b) Shahat's job performance issues were numerous and varied, including outright refusals to carry out the supervisor's instructions, Tr. 36-39, 273-278, untimely work, Tr. 267-273, and inaccurate work resulting in delays and potential additional expenses, *Id.*, Resp. Ex. 8;
- (c) Shahat's job performance issues were significantly greater in number and variety, and continued for a longer period, than those of other "piping" engineers, compare Resp. Ex. 8 (Mohajeri timeline for Shahat) and Resp. Exs. 2, 20 (Mohajeri timelines for other "piping" engineers);<sup>21</sup>
- (d) Shahat's job duties and assignments were significantly reduced/limited by Employer, well before Shahat's July 11, 2016 complaint, because Employer believed he had refused or failed to satisfactorily perform the duties required by his position, Tr. 261 (Mohajeri); 435-436 (Deen) and, at the end of his employment, Shahat's duties were "very basic" and he was performing "administrative" tasks, Tr. 261 (Mohajeri); 436 (Deen); and
- (e) Employer engaged in numerous and varied—but unsuccessful—efforts to improve Shahat's performance in order to avoid having to harm his career, including a decision by a discharge decisionmaker (Deen) to "bump up" Shahat's 2016 annual evaluation so he could avoid a performance improvement plan, Tr. 441-443.

The ALJ erroneously concluded, despite such evidence, that General Counsel had satisfied its burden of proving that Employer was motivated to discharge Shahat because of "concerted" activity. Once again, the ALJ's erroneous overall conclusion is based on underlying erroneous findings and conclusions which were inconsistent with or not found in the record evidence or were not justified by the law. Six other errors are most notable.

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<sup>20</sup> Shahat did deny certain performance issues identified by Mohajeri but the majority of Mohajeri's specific criticisms and counselings reflected in the supervisor's Shahat "timeline" (Resp. Ex. 8) were not denied or contested at trial.

<sup>21</sup> Supervisor Mohajeri and Manager Deen were communicating about Shahat's unsatisfactory work/work habits more than a year prior to the discharge decision. For example, Mohajeri reported to Deen on June 11, 2015, that Shahat was "consistently exhibiting a poor performance and also having difficulties following directions." Resp. Ex. 17.

First, the ALJ found “suspicious” the timing of the discharge decision. The ALJ found that the temporal proximity of the decision (supposedly following close in time to Shahat’s July 11, 2016 written complaint) suggested the decision was prompted by the complaint. Dec. 34 at 25-28. However, such suspicion immediately disappears if the testimony of witnesses Deen and Shannon is considered: as explained in detail, above, the preponderance of the evidence is that they made the discharge decision before they learned of any Shahat complaint. Significantly, Shahat’s own testimony supports the Deen/Shannon testimony that they did not know of his dissatisfactions before the making of the discharge decision: Shahat testified that prior to July 11 (a) he had not previously informed Deen of the matters discussed in his complaint, Tr. 149, ll. 5-11, and (b) he had never been to HR about those issues. Tr. 151. Further, Deen and Shannon testified that they never had any indication that Shahat was acting with, for or on behalf of other employees. Tr. 467 (Deen); 395 (Shannon). Thus, there was no basis from which to conclude the decisionmakers knew of “concerted” activity before deciding Shahat must be terminated.<sup>22</sup>

Second, the ALJ erroneously discredited the Deen and Shannon testimony about the date of the discharge decision for two reasons, but neither survives examination in light of the entire record. The ALJ thought that Shannon’s testimony was inconsistent with the affidavit he provided to the General Counsel during his investigation. Dec. 17 at fn. 20. However, as discussed above, the affidavit was understandably ambiguous in light of the method by which it was obtained and, further, any apparent inconsistency was resolved with Shannon’s testimony at the hearing. And the ALJ thought that Deen’s testimony about deciding to discharge Shahat on July 7, 2016 was

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<sup>22</sup> In fact, it is the timing of Shahat’s July 11, 2016 complaint that is more suspect: he had just refused a direct order from his supervisor (the second time in approximately a year), and he could not have forgotten the consequence of his first refusal (potential discipline for insubordination), it is plausible to believe that, fearing that his job could be in jeopardy on July 7, 2016 after refusing to relocate his cubicle, Shahat (a) did not report to work on July 8, 2016, Tr. 172-173, in order to craft the documents he presented to Deen on July 11 and (b) submitted his complaint in an effort to preempt discipline/discharge (which effort was successful, because he was not separated for several more months).

inconsistent with the contemporaneous preparation by Mohajeri of a “Disciplinary Action Notice” (i.e., a form of discipline less serious than discharge). There is no doubt that Deen approved the “Notice,” Tr. 449 (Deen), but the record reflects that, as it was being prepared by Mohajeri, Deen also was reflecting on Shahat’s history with the company and Employer’s extensive but ultimately unsuccessful motivational/improvement efforts with Shahat. It then became apparent to Deen that discipline would be futile; he testified (Tr. 487) that “I don’t think this is going to get any better. I mean we are down to the point where even simple tasks can’t be accomplished . . . I think we just need to move forward and terminate him.” *See also* 458, 485-487 (Deen). Thus, the Notice and discharge decision were not inconsistent or evidence of pretext or animus but, rather, are consistent with a careful, logical, thoughtful engineer/manager—who repeatedly and consistently had personally supported Shahat--simply deliberating about the most logical and likely effective course of action in light of known facts and possible strategy options.

Third, the ALJ found, erroneously, that Employer’s investigation of Shahat’s complaint was inadequate. Dec. 22 at 22, 33 at 1. However, Hester and Shannon testified that she spoke to witnesses thought to have knowledge and other persons were not contacted in part because Shahat’s issues seemed to be focused on him, Tr. 358, and they both asked Shahat to identify other potential witnesses to be interviewed but he refused to identify them, thus impairing and limiting the investigation. Tr. 74, 350. The thinking of the HR personnel reflects a common-sense approach to the investigation: rather than stirring up an entire department about allegations which appeared personal to Shahat, and which allegations were very surprising to HR (because Shahat never had previously reported them, Tr. 151 (Shahat)), the HR investigators focused on the individuals who were thought to have useful information.

Fourth, the ALJ then erred in jumping to the conclusion that his perception of infirmity in the company’s investigation of Shahat’s complaint was evidence of Employer animus. However,

in light of the overwhelming evidence of Employer's efforts to support and rehabilitate Shahat, it is more plausible to conclude the any such infirmities were the consequences of (a) the investigators' good-faith belief that no more extensive inquiries were necessary, particularly because Shahat refused to identify any likely witnesses who might have useful information and/or (b) the investigators were distracted by or submerged in the then-heavy HR workload (which included the implementation of new systems). Tr. 353 (Hester). In short, there simply was no record evidence connecting the nature or scope of the Employer's inquiry to the decision to discharge Shahat (or the reasons for it).<sup>23</sup> The worst that possibly can be said of Employer's investigation is that it was somehow negligent but, of course, "negligent" is not "nefarious."<sup>24</sup>

Fifth, in erroneously holding that Shahat's discharge was motivated by his complaint rather than his performance, the ALJ erred in giving insufficient weight to the number and the variety and the duration of Shahat's performance issues. Surprisingly, the ALJ erred in stating that, immediately before his July 11, 2016 complaint, Shahat was not in danger of being fired for poor performance, Dec. 34 at 27, thereby ignoring or wrongly discounting the extensive Mohajeri and Deen testimony about Shahat's performance issues and the Deen and Shannon testimony about the decisional process.<sup>25</sup> In fact, the undisputed evidence was that Deen began thinking about

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<sup>23</sup> The ALJ acknowledged that *Manor Care Health Services—Easton*, 356 NLRB 202 (2010) and its progeny, on which he premised his conclusions about the investigation, were distinguishable, because that case arose from an employer's inadequate investigation of a charging party before discharging him, and not a failure to investigate a claim by a charging party as here. Dec. 35, fn. 34. *Manor Care* also can be distinguished for other reasons, including because there (unlike here) there was direct evidence of employer animus, the employer failed to deny charging party's accusations of retaliation, and the employer did not follow its normal procedures in disciplining the charging party.

<sup>24</sup> It also simply is illogical in a practical sense to think that "poor investigation = employer animus." If Employer truly was inclined to terminate Shahat because of his complaint, it would have done so immediately (mid-July) rather than spending its energy investigating his complaint and allowing him to remain on the company payroll for a period of months, that is, by allowing him to continue being highly-paid for performing merely "administrative" duties.

<sup>25</sup> Significantly, the ALJ discredited (erroneously, Employer believes) the Deen and Shannon testimony as to the timing of the discharge decision but the ALJ did not discredit their testimony about Shahat's performance issues.

Shahat's discharge in May 2016 in conjunction with the engineer's annual evaluation which had to be "bumped up" to avoid putting him on a PIP that would impact his future. Tr. 296 (Mohajeri); 458 (Deen).

Finally, and significantly, the ALJ erred by giving insufficient weight to the absence of evidence of any Shahat "comparators," that is, employees who did not complain and were not discharged because of unsatisfactory performance. To the contrary, the evidence was that Employer does not tolerate or ignore poor performance of engineers in the "piping" group and the company routinely discharges personnel for performance if coaching/counseling efforts are unsuccessful, irrespective of whether such personnel have complained or engaged in concerted activity. Tr. 298. Significantly, the undisputed testimony was that, at the time of the decision to discharge Shahat, there was only one other "piping" engineer performing as poorly (Amasis Yazid).<sup>26</sup> Tr. 427-48, 465 (Deen). And comparison of Mohajeri's "timeline" for Shahat shows 31 lines of performance-related issues and events whereas the "timelines" for other engineers show substantially fewer lines. *Compare* Resp. Ex. 8 (Mohajeri timeline for Shahat) *with* Resp. Exs. 2 and 20 (timelines for other "piping" engineers). Finally, the undisputed testimony was that Shahat was not treated differently than other employees and was treated in accordance with Employer policies. Tr. 398 (Mohajeri); 347 (Hester); 391, 395 (Shannon); 428, 472 (Deen).

In sum, the ALJ erred by finding that General Counsel had established a *prima facie* violation of Section 8(a)(1). The preponderance of the record evidence is that Deen and Shannon made the decision to discharge Shahat several days before they first learned of Shahat's complaint so there could not have been the necessary cause-and-effect sequence of events allowing any

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<sup>26</sup> Yazid was also discharged and was the basis for a Section 8(a)(1) claim asserted by General Counsel. There was extensive evidence at trial about his significant performance deficiencies and the ALJ has recommended that the claim be dismissed. Dec. 30-31.



inference of Employer retaliation. Since the decision to discharge Shahat could not have been motivated by any “concerted” activity, there could not have been a Section 8(a)(1) violation and the Complaint should be dismissed. *See, e.g., Banner Health System*, 358 NLRB No. 93 (2012) (affirming judge’s findings that a counselling for insubordination and a negative evaluation did not violate Section 8(a)(1) because they occurred before any protected activity).

D. Employer established a *Wright Line* affirmative defense, i.e., Shahat would have been discharged absent any protected concerted activity. (Exceptions 3, 19 and 20).

i. Applicable law.

The Board’s decisions addressing the *Wright Line* affirmative defense emphasize two factors, that is, whether there existed a legitimate reason for the employer’s contested discipline/discharge and the absence of record evidence that comparably-situated employees were treated more leniently. When those factors are present, the Board typically finds that the employer has established a *Wright Line* defense. *See, e.g., Elko General Hospital*, 347 NLRB 1425 (2006); *Waste Management of Arizona*, 345 NLRB 1339 (2005); *Mountain Shadows Golf Resort*, 338 NLRB 581 (2002); *Tom Rice Buick*, 334 NLRB 785 (2001).

ii. Employer would have fired Shahat even absent “concerted” activity.

Shahat was given multiple and various opportunities to improve his job performance over a period of many months. He failed or refused to do so. Mohajeri’s timeline for Shahat, reflecting contemporaneous notes about the engineer’s performance, shows multiple Shahat issues more than a year before his July 11, 2016 complaint and even after his “bumped up” evaluation in May 2016 (an evaluation accompanied by serious Employer admonitions that he must improve). Resp. Ex. 8. The timeline confirms Deen’s and Mohajeri’s testimony that Shahat’s performance did not improve (i) after the evaluation and before the July 7, 2016 discharge decision or (ii) after the decision but before the implementation of the discharge in October 2016. Tr. 296-297 (Mohajeri);

444 (Deen). As Deen testified so clearly in his assessment of Shahat's performance as of July 7, 2016, "... it was just untenable. There was no effort on his part to improve in any way; even small minor things like that [moving to a different cubicle] would lead to just major disruption." Tr. 458, ll. 18-20. And, as Deen explained: "we had been through a very, you know, lengthy time with Mohamed trying to encourage him and coach him to improve his work, and when something this simple [July 7, 2016 cubicle relocation] becomes such a big deal, I just didn't feel in my mind that there was any chance for improvement." Tr. 464 (Deen).

There was undisputed evidence of a consistent Employer practice of discharging employees for poor performance if coaching/counseling efforts are unsuccessful irrespective of whether such poorly-performing personnel have engaged in any arguably protected concerted activity. *See, e.g.*, Tr. 298. There was no evidence of employees being treated more leniently than Shahat and, as to him, witnesses (and decisionmakers) Deen and Shannon each testified without contradiction that, given his on-going unsatisfactory performance, Shahat would have been discharged even absent any complaint about Mohajeri. *See, e.g.*, Tr. 395 (Shannon); 471 (Deen).

The ALJ erroneously found and concluded that Employer's affirmative defense was not established because the company failed to discipline Shahat or place him on a performance improvement plan after his July complaint. Dec. 35 at 13. However, any such conclusion ignores both reality and logic. Any Employer discipline/PIP of Shahat after his complaint, as the ALJ implies should have occurred, would have immediately been characterized as "retaliation" (a claim which likely would have been asserted by both Shahat and by the General Counsel). Employer handled Shahat's post-July issues consistent with its decision not to immediately terminate Shahat or force him to relocate his cubicle until the completion of the investigation. Employer logically responded to Shahat's on-going performance issues with coaching and counselling. Employer acted as aggressively as possible without appearing to retaliate against Shahat.

The two factors often used by the Board in assessing *Wright Line* affirmative defenses were established in the record evidence. Therefore, the ALJ erred in not finding that Employer had established its affirmative defense and in not dismissing the Section 8(a)(1) claim related to the discharge of Shahat.

### **CONCLUSION**

General Counsel has failed to prove that Mitsubishi Hitachi Power Systems Americas, Inc. violated Section 8(a)(1) of the National Labor Relations Act in its discharge of Mohamed Shahat. The record evidence shows that Shahat did not engage in “concerted” activity known to the Employer and that he was discharged for legitimate business reasons in compliance with law.

The General Counsel did not establish a *prima facie* case and, even if that is presumed, Employer clearly established an affirmative defense. The Complaint should be dismissed.

Respectfully submitted,

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### **PROOF OF SERVICE**

I certify that on this March 1, 2018, a copy of "Respondent Employer's Brief in Support of Exceptions" was transmitted by email to John Plympton, Esq., Counsel for the General Counsel, National Labor Relations Board Region 12, 201 E. Kennedy Blvd.—Suite 530, Tampa, FL 33602.

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